

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

Inquiry Required by the Satellite Home )  
Viewer Extension and Reauthorization Act )  
On Rules Affecting Competition in the )  
Television Marketplace )

MB Docket No. 05-28

**COMMENTS**



**I. Introduction and Summary**

In SHVERA, Congress again underscored the importance of rural cable companies in delivering the promises of advanced services to rural markets. Concerned with the growing disparity in market power between the DBS duopoly and smaller cable companies, Congress directed the Commission to investigate how the current broadcast signal carriage regime impacts rural cable operators' ability to compete with DBS and to deliver DTV signals. ACA welcomes this important inquiry.

Our comments focus on two areas:

- The need for rural cable systems to have access to satellite delivered broadcast signals on nondiscriminatory prices and terms; and
- The competitive harms of current retransmission consent practices.

In a separate proceeding, we will address the abuse of broadcast exclusivity and the need to reform Commission regulations in those areas.

**Congress should address the public interest harms resulting from the refusal by DBS providers to allow rural cable systems access to satellite delivered local broadcast signals.** The current local-into-local regime places hundreds of rural cable systems at an impossible competitive disadvantage. The DBS duopoly is exploiting this unintended legislative advantage with callous disregard for the public interest. As a result, more than one million rural consumers cannot receive a full complement of good quality local broadcast signals from their provider of choice.

The problem is this: Because of distance from transmitters, many rural cable systems cannot receive good quality signals for all local broadcast signals. By contrast, in local-into-local markets, DBS can deliver clear local broadcast signals regardless of distance from transmitters. As DirecTV and EchoStar well know, the lack of local stations can be a serious handicap, and it was this limitation that caused Congress in 1999 to enact the Satellite Home Viewer Improvement Act. Now following the reauthorization through SHVERA, Congress should address this problem again by allowing rural cable systems to receive DBS delivered broadcast signals, thereby providing good quality local broadcast signals to their rural customers. This solution causes no undue technical or economic burden on any party. The hitch? The DBS operators refuse.

When competing with rural cable systems, DirecTV and EchoStar do not need this additional competitive advantage. The public interest in widespread dissemination of good quality local broadcast signals should prevail.

**Recommendations to Congress.** To address this, we ask the Commission to recommend adjustments to the retransmission consent laws that provide for the

following:

In markets where a satellite carrier delivers local-into-local signals, that satellite carrier shall make those signals available to MVPDs on nondiscriminatory prices, terms and conditions, when: (i) the MVPD cannot receive a good quality signal off-air; and (ii) the MVPD has the consent of the broadcaster to retransmit the signal.

This modest change will help correct a critical competitive imbalance under current law and advance the public interest.

**Congress should address the public interest harms resulting from current retransmission consent practices.** ACA has addressed in other proceedings how the current retransmission consent regime has increasingly hurt smaller distributors' ability to compete. In short, for smaller cable companies, the retransmission consent practices of the networks and major affiliate groups have increased costs and reduced programming choices. This combination has further eroded the ability of smaller companies to compete with the much more powerful DirecTV and EchoStar. ACA has documented this in several filings, and we ask the Commission to incorporate those filings into the record in this docket.

**Recommendations to Congress.** Congress should closely scrutinize the retransmission consent laws in light of substantial marketplace changes since 1992. A range of possible changes should be considered. The Commission can readily recommend one set of fixes that is currently being tested – the retransmission consent conditions imposed on News Corp. The three key components of those conditions include: (i) a streamlined arbitration process; (ii) the ability to carry a signal pending dispute resolution; and (iii) special conditions for smaller cable companies. These conditions could be applied to the retransmission consent process broadly, with positive

results.

**The Commission should address the serious competitive harm caused by abuse of broadcast exclusivity.** The Public Notice also raises the question of how broadcast exclusivity affects smaller cable companies' ability to compete. Currently, certain networks and affiliate groups are using broadcast exclusivity solely to raise the "price" of retransmission consent. This conduct conflicts with the intent of the exclusivity regulations and, in many cases, squarely conflicts with the retransmission consent good faith negotiation regulations.

This will erupt into a crisis in the very near future. Broadcasters are strategically targeting the small cable sector with designs to extract at least \$860 million from rural consumers during the next round of retransmission consent. The Commission has ample authority to address this problem. ACA will ask the Commission to do so in a Petition for Rulemaking to be filed shortly. We intend the Petition for Rulemaking to be considered as a separate item from the report in this proceeding.

**The American Cable Association.** ACA represents nearly 1,100 independent cable companies that serve more than 8 million cable subscribers, primarily in smaller markets and rural areas. ACA member systems are located in all 50 states and in virtually every congressional district. The companies range from family-run cable businesses serving a single town to multiple system operators that focus on serving smaller markets. More than half of ACA's members serve fewer than 1,000 subscribers. All ACA members face the challenges of upgrading and operating broadband networks in lower-density markets. All ACA members and their customers face higher costs for basic cable service because of the retransmission consent

practices of network owners and affiliate groups.

**II. Congress should address the public interest harm resulting from the refusal by DBS providers to allow rural cable systems access to satellite delivered local broadcast signals.**

**The problem.** In some rural markets, small systems are so remote from broadcast transmitters that the systems cannot pick up good quality signals over the air. It follows that what these cable systems cannot receive, they cannot distribute to customers.

Increasingly, these small systems are becoming part of local-into-local markets. Now, one or both members of the DBS duopoly can deliver clear local broadcast signals, regardless of distance from a transmitter site. The competitive implications are self-evident. Not only can the DBS providers deliver local signals, but they deliver good quality local signals that the rural cable systems cannot.

The DTV transition exacerbates the problem. Broadcasters launching DTV services in smaller markets often broadcast at reduced power, so signal propagation is further reduced. More rural systems are disadvantaged.

It is well-settled that the widespread delivery of good quality local broadcast signals advances the public interest. The entire body of broadcast signal carriage law and regulation has developed from this fundamental principle. In more remote rural markets, the DBS companies are disregarding this principle, solely to increase their already substantial competitive advantage over rural cable systems. Consumers and competition are suffering, as is the DTV transition. Given DirecTV's and EchoStar's continuing refusals to engage in a marketplace solution, the Commission and Congress need to step in.

**The solution.** A readily available, low-cost solution already exists. Rural cable systems can receive good quality local broadcast signals delivered via satellite and retransmit those signals to customers. All that is required is the consent of the DBS providers. DirecTV and EchoStar refuse to provide that consent.

As a result, an estimated 1 million rural consumers cannot receive a full complement of good quality local broadcast signals, solely because they live in remote regions. In response to a recent ACA member poll on this issue, over 100 companies indicated that they could provide better quality local broadcast signals to their customers if they were permitted to access satellite delivered broadcast signals. These companies serve more than one million customers in remote areas.

The small cable sector has attempted to reach a marketplace solution on this issue. The National Cable Television Cooperative has repeatedly asked both EchoStar and DirecTV for permission to acquire for NCTC members access to local-into-local network affiliate feeds at nondiscriminatory prices. EchoStar and DirecTV have refused.

To be clear, we are not asking for these signals for free. We are asking for access on nondiscriminatory prices and terms. A marketplace for measuring these prices and terms already exists. Both EchoStar and DirecTV have active businesses in wholesaling their signals to MDUs, complexes, universities and other enterprises. These transactions will provide a ready benchmark to protect against anticompetitive conduct.

**Recommendations to Congress.** ACA asks the Commission to recommend in its report the following statutory change:

In markets where a satellite carrier delivers local-into-local signals, that satellite carrier shall make those signals available to MVPDs on nondiscriminatory prices, terms and conditions, when: (i) the MVPD cannot receive a good quality signal off-air; and (ii) the MVPD has the

consent of the broadcaster to retransmit the signal.

This change will help advance the public interest in widespread dissemination of good quality local broadcast signals and address a serious competitive imbalance currently hurting rural cable systems.

### **III. Congress should address the public interest harms resulting from current retransmission consent practices.**

**The problem.** ACA has provided the Commission with extensive information on the competitive harms of current retransmission consent practices. The network and affiliate groups' retransmission consent tying practices cost rural cable companies and their subscribers millions each year and tie up limited channel capacity that could be used to deliver DTV signals. Retransmission consent tying has expanded to where some members of the largest programming conglomerates have required smaller cable companies to carry affiliated satellite programming in systems outside of the local broadcast market, and in some cases several states away. In this way, ownership of a broadcast license has been used to force carriage of, and payment for, affiliated programming by rural consumers that do not even receive the broadcast signal. This tying diverts resources that rural cable operators could otherwise use to upgrade their systems to better compete against DBS, deliver DTV signals, and offer advanced services.

In several filings, ACA has given detailed examples and analyses of how network owners and affiliate groups have used retransmission consent to obtain carriage of affiliate programming on smaller market cable systems. The filings contain extensive information on how current retransmission consent practices hurt rural cable systems' ability to upgrade networks, deliver advanced services, and compete with DBS. We ask

the Commission to incorporate these filings in the record of this proceeding. The filings include:

- *Inquiry Concerning A La Carte, Themed Tier Programming and Pricing, Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems*, MB Docket No. 04-207, Comments of the American Cable Association (filed July 12, 2004) at 30-37 (describing the retransmission consent practices employed against smaller cable operators and how those practices increase costs, decrease choice, and hurt smaller cable operators' ability to upgrade networks, offer advanced services, and compete).
- *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 03-172, Comments of the American Cable Association (filed September 11, 2003) at 1-8 (describing retransmission consent abuses by media conglomerates).
- *In re Consolidated Application of General Motors Corporation, Hughes Electronic Corporation, and The News Corporation, For Consent to Transfer Control*, MB Docket No. 03-124, Comments of the American Cable Association (filed June 16, 2003) at iii-v, 1-3, 8-11, 16-18, 21-23, 30 (describing how media conglomerates leverage programming and broadcast assets to impose costly terms and conditions of program access and retransmission consent on smaller market cable operators).
- *In the Matter of 2002 Biennial Regulatory Review, Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket 02-277, Reply Comments of the American Cable Association (filed February 3, 2003) at 1-5, 8-9 (describing how network owners and major affiliate groups exploit retransmission consent when dealing with small cable companies, resulting in higher costs, less choice, and disregard for localism).
- *Petition for Inquiry into Retransmission Consent Practices, American Cable Association*, Proceeding PRM02MB (filed October 1, 2002) at ii-iii, 1-5, 10-11, 19 (describing retransmission consent tying arrangements that network owners and major affiliate groups impose on smaller cable operators, resulting in increased cable costs and decreased programming choices) and First Supplement (filed December 9, 2002) at 1-3, 19 (additional examples of retransmission consent abuses).
- *In the Matter of Carriage of Digital Television Broadcast Signals*, CS Docket No. 98-120, Comments of Small Cable Business Association (filed



October 13, 1998) and Comments of the American Cable Association (filed June 8, 2001) at 2-3 (describing the continuing trend of media concentration in the network broadcast and satellite programming industries).

To understand fully the impact of retransmission consent practices on competition in rural markets, the Commission can draw upon the extensive record already developed. These filings describe how powerful networks and affiliate groups require not only carriage but lowest tier placement of affiliated satellite programming as a condition of access to local broadcast signals. As a result, smaller cable companies and their customers must pay for programming that they would not otherwise choose, solely to receive a free, over-the-air local broadcast station. This practice reduces choice and competitive packaging, while increasing costs in smaller markets.

The Commission itself is increasingly questioning this conduct. In 2001, the Commission expressly recognized small cable's "important concerns" over retransmission consent tying.<sup>1</sup> The Commission committed to "continue to monitor the situation with respect to potential anticompetitive conduct by broadcasters in this context."<sup>2</sup> Upon a showing that tying arrangements harm small cable operators and their subscribers, the Commission would "consider appropriate courses of action".<sup>3</sup>

Last year, the Commission took specific action to restrain the use of

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<sup>1</sup> *In the Matter of Carriage of Digital Television Broadcast Signals*, First Report and Order and Further Notice of Proposed Rulemaking, 17 FCC Rcd. 6441 (2001), ¶ 35 (referencing comments of the Small Cable Business Association, the former name of ACA), ¶ 121, and *Final Regulatory Flexibility Analysis*, ¶ 20.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

retransmission consent by News Corp. In the *News Corp. Order*,<sup>4</sup> the Commission analyzed the incentive and ability of network owners to use retransmission consent to gain distribution of affiliated programming and to increase the prices paid for that programming.<sup>5</sup> The Commission expressly recognized the harm to competition and consumers that can result from this conduct.<sup>6</sup> Most importantly for our purposes, the Commission recognized that small and medium size cable companies were especially vulnerable to this conduct.<sup>7</sup> To mitigate these harms, the Commission imposed a range of retransmission consent conditions on News Corp., including special conditions for dealing with small cable companies.<sup>8</sup>

Most recently, the Media Bureau's *Report on the Packaging and Sale of Video Programming Services to the Public* suggests that retransmission consent practices harm smaller cable companies' ability to offer competitive programming packages in

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<sup>4</sup> *In the Matter of General Motors Corporation and Hughes Electronic Corporation, Transferors and The News Corporation Limited, Transferee, For Authority to Transfer Control*, MB Docket No. 03-124, *Memorandum Opinion and Order*, 19 FCC Rcd. 473 (2004) ("*News Corp. Order*").

<sup>5</sup> *News Corp. Order* at ¶ 203 ("News Corp.'s existing control of MVPDs' access to a large number of local broadcast stations airing highly popular Fox network programming, when combined with ownership of a nationwide DBS platform, will likely increase News Corp.'s incentive and ability engage in temporary foreclosure strategies aimed at increasing its programming fees thereby having the effect of raising rival MVPDs' costs by lowering the costs to News Corp. of engaging in such behavior.").

<sup>6</sup> *Id.* ¶ 109 ("News Corp.'s use of market power to extract artificially high levels of compensation from MVPD rivals, or other carriage concessions, could make rival MVPDs less viable options for consumers, thus limiting consumer choice.").

<sup>7</sup> *Id.* ¶ 176.

<sup>8</sup> *Id.* ¶¶ 169-79, 213-26 (imposing conditions on how News Corp. and its affiliates deal with smaller cable companies for retransmission consent and access to regional sports networks).

rural markets.<sup>9</sup> The Report states, “ACA and similar groups state that retransmission consent and other signal carriage requirements enable network owners and major affiliate groups to restrict how smaller cable operators package programming and how consumers can choose programming in local markets.”<sup>10</sup>

All of these signals point in one direction – the need for retransmission consent reform to address the competitive imbalance in rural markets.

**Solutions.** Media consolidation and other marketplace changes since 1992 warrant close scrutiny of the retransmission consent laws. Congress should consider a range of reforms. The Commission can recommend its News. Corp. conditions as one set of changes that, applied across the industry, could help alleviate the current public interest harms that result in rural markets. The three key components of those conditions will help address the current competitive imbalance: (i) a streamlined dispute resolution process; (ii) certainty of carriage while a dispute is pending; and (iii) special protections for smaller cable companies.

The Commission’s input on retransmission consent will be critical for developing a fair and balanced record for Congress to consider. To that end, the Commission’s report should build upon and include the extensive knowledge base already developed at the Commission through the filings of ACA and others, and through the Commission’s analyses in other proceedings.

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<sup>9</sup> *Report on the Packaging and Sale of Video Programming Services to the Public*, MB Docket No. 04-207 (rel. Nov. 18, 2004).

<sup>10</sup> *Id.* at 76.

#### **IV. Conclusion**

ACA appreciates the Commission undertaking this important inquiry and will make all Association resources available to assist.

Respectfully submitted,

**AMERICAN CABLE ASSOCIATION**

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